

Ensuring consumer safety within the framework of the precautionary principle

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ABSTRACT

The consumer has become a victim of scientific development in general and in the field of consumption in particular, so that he is led behind advertisements and temptations, and the risks and damages to him have increased.

The research is concerned with the obligation to ensure consumer safety within the framework of the precautionary principle in order to confront the modern damages that have become to the consumer.

Therefore, the legislator must activate the legal mechanisms to protect the consumer and confront these damages.

Introduction:

Scientific development in various food, health, agricultural and environmental fields has contributed to achieving consumer welfare and satisfying his increasing desires, but at the same time it carries with it potential dangers that threaten the security and safety of people, property and the natural environment. Thus, the primary role of the law for consumer protection must be activated, through its many mechanisms, including the principle of precaution and its role in consumer protection.

The issue of consumer protection, especially the obligation to ensure his physical and material safety, is considered one of the thorny issues at the present time, and despite the numerous studies of it, it has not yet achieved the consumer's desire to achieve comprehensive and adequate protection for him, and from this the importance of the subject emerges in:

Finding a kind of balance between freedom of production and trade on the one hand, and a commitment to providing adequate safety and security to the consumer on the other hand.

Also, the consumer's pursuit of satisfying his desires for consumer materials and products has become an inevitable necessity. Therefore, the legal framework for production must be controlled and the legal means that the consumer follows to ensure his safety and security must be facilitated.

There are many problems posed by this topic. The main problem arises around the role of the principle of precaution in consumer protection?

Which includes sub-questions:

What is the relationship between the obligation to ensure consumer safety?

What is the impact of the precautionary principle on the obligation to ensure consumer safety?

To answer the problem raised, the analytical method was adopted, in addition to the comparative method.

The study has been divided into two parts, the first of which is devoted to defining the general framework of the obligation to ensure safety and the principle of precaution, while the second part is devoted to the impact of the principle of precaution on the obligation to ensure safety.

1- The general framework for the commitment to ensuring safety and the principle of precaution

1-1 Safety Assurance Concept

1-1-1 Defining the obligation to ensure safety

The French judiciary is credited with creating the commitment to safety, first appearing in the Contract of Carriage. Pursuant to the famous decision of the French Court of Cassation dated November 21, 1911. Then it became widespread in many contracts, including the work contract, the hotel contract, and the ski contract until it moved to the sale contract.

And it was explicitly approved in the decision issued on January 22, 1991 in a case related to serious injuries to the skin of a woman as a result of her use of cosmetics, and she said that "the producer and seller of some commonly used products, especially those dedicated to the care and comfort of the human body, bear an obligation to ensure safety" (Cass 1^{er} Civ 22 janv 1991 "le fabricant et le vendeur de certains produits d'usage courant spécialement destinés aux soins ou au confort du corps humain sont tenus d'une obligation de sécurité"). And the decision issued on 04/28/1998 regarding a woman infected with HIV as a result of a blood transfusion. She filed a lawsuit, in addition to her husband and children, against the Center Blood transfusion, and after referring to Articles 1147 and 1384 BC, interpreted in the light of European directives, it ruled that each producer is responsible for damages caused by defects in his products, whether for direct victims or victims of apostasy, without discrimination between them, whether they are contractors or not.

The commitment to ensuring safety has been enshrined in the legislation of both France and Algeria, starting with the texts regulating consumer protection, then related to product responsibility.

The French legislator recognized the obligation to ensure safety as a legal obligation for professionals for the first time in the Law on Consumer Security issued on 07/21/1983 (La loi 83-660 du 21/07/1983 sur la sécurité du consommateur dit "la loi la lumière", devenant code de la consommation loi N° 94-442 du 03/01/1994), which became the legalization of consumption under Law 94-442, where it was stated in Article L221-1 that "goods and services should be

included if they are used in Ordinary circumstances or in other reasonable circumstances that a professional can expect, the safety that we legally expect, and not affecting the health of people.”¹ Thus, he clarified the totality of the tools and mechanisms of administrative control and protection over materials and services that do not provide a commitment to a guarantee of safety (Art L 221-1 C cons fr " les produites et les services doivent dans les conditions normales d'utilisations ou dans d'autre conditions raisonnablement prévisibles par le professionnel présenter la sécurité à laquelle on peut légitimement s'attendre et ne pas porter atteinte à la sante des personnes") .

Then came Law 98-389 issued on May 19, 1998, which added to QQM Articles 1386-1 et seq. relating to liability for defective products, in order to add or supplement the deficiency that was afflicting the Consumer Protection Law. Article 1386-4 stipulates (Art L 221-1 C cons fr " les produites et les services doivent dans les conditions normales d'utilisations ou dans d'autre conditions raisonnablement prévisibles par le professionnel présenter la sécurité à laquelle on peut légitimement s'attendre et ne pas porter atteinte à la sante des personnes) . “A product is defective

within the meaning of this section when it does not provide the safety that we can legally expect” (Art 1386-4 al 1 c civ fr "Un produit est défectueux au sens de présent titre lorsqu' il n'offre pas la sécurité à laquelle on peut légitimement s'attendre ").

As for the Algerian legislator, it stipulated the obligation to ensure safety for the first time in Consumer Protection Law 89-02 through Articles 2 and 3 of it, and it was also approved by Law 09-03 related to consumer protection and fraud, which is what Article 09 of it states.

It was also approved by the text of Article 140 bis BC when it stipulates that the producer is responsible for the damage resulting from a defect in his product towards all persons, and by defective product, he means that product that does not provide safety towards consumers, in which breaches the obligation to ensure safety.

1-1-1 Nature of the obligation to ensure safety

The nature of the obligation to ensure safety is meant to determine whether it is an obligation to exercise care or an obligation to achieve a result.

- Obligation to ensure safety An obligation to take care

If we say that the obligation to ensure safety is an obligation to take care, it means that it is not sufficient for the injured person to prove that the damage occurred by the product, but rather he must provide evidence of the product's error represented in not taking the necessary precautions to prevent harm to others.

For this reason, the French Court of Cassation concluded, in a single decision, that “a professional seller is not obligated, with regard to the damages that the thing sold to inflicts to the buyer, to achieve a result” (Cass 1^{er} Civ. 1984). In the sense of violation, his obligation is to exercise care (means). However, this decision was severely criticized by jurisprudence.

- Obligation to ensure safety An obligation to achieving a result

If we said that the obligation to guarantee safety is a commitment to a real result, this leads to the injured obtaining compensation in all cases, as soon as it is proven that the damage occurred as a result of the intervention of a product, that is, the failure to implement the obligation to guarantee safety is concluded as soon as the harmful incident occurred, and the product cannot, when authorized get rid of his responsibility only to prove the foreign cause.

On this basis, the Nanterre (TGI Nanterre. 20 Dec 2000) court ruled the liability of a drug product (coup-fain) that caused a woman to develop high blood pressure (HTAP), as it was keen that the producer could not deny responsibility except by proving the foreign cause, and stressing that the commitment to safety is an obligation to achieve a result(Beatrice. P15.).

However, jurisprudence criticized this trend because it leads to very dangerous economic results. Contemporary products are generally characterized by a degree of danger and require caution in their use.

- Obligation to ensure safety An obligation a middle between the means and the result

The obligation to ensure safety is not an obligation to take care, but rather it is more than that, and it is not an obligation to achieve a result, it is less.

It is more than the obligation to take care, because it does not require evidence of error or negligence on the part of the product, so there is no lesson in the behavior of the product, but rather what the product contains from the defect.

Also, this obligation is less than the obligation to achieve a result, because proving the damage alone is not sufficient for the consumer to obtain compensation for the damage incurred by the product. Rather, he must establish evidence of a defect that caused the damage, and proving the defect is not difficult, especially since Article 1386-3 defined The fault.

1-2The concept of the precautionary principle 1-1

The principle of precaution is a relatively recent general principle. It was first crystallized at the international level, then embodied at the internal level of states.

1-2-1 Defining the precautionary principle

The principle of precaution is decided according to which it is decided to take a set of precautionary measures and precautions, whenever there are sufficient reasons to believe that an activity or product may cause serious irreparable harm, without requiring conclusive scientific evidence. These measures and precautions may aim to reduce or terminate the activity or prevent product...etc. Thus, the principle of precaution takes into account two aspects, the side of potential damage characterized by a degree of seriousness and the absence of conclusive scientific evidence, and the side of precautionary measures that should be taken into account to avoid such damage or at least reduce its severity to the maximum acceptable extent.

Therefore, the principle of precaution enshrines the idea of a proactive role to prevent the severe and catastrophic effects (significant and irrecoverable damage) of human activities and products. those damages, or determine their effects and severity (Godard, 2008, p. 54.).

It aims to fill the void related to the absence of scientific safety as long as there is doubt about the future effects, as doubt is the main characteristic that distinguishes the principle of precaution from the principle of prevention as long as the latter relates to known and confirmed damage, and therefore the measures are directed to stopping the activity that is the source of these damages.

While the principle of precaution is directed to the management of unknown or relatively known damage as long as there is doubt about the possibility of its occurrence, and it includes the need to take measures aimed at reducing such damage or at least reducing the degree of its seriousness from serious to repairable (Ben Maarouf.2011-2012 p. 116.).

Since this principle was initially devoted to protecting the environment from unknown and future dangers in order to avoid their effects, or at least reduce them, it does not affect only the field of the environment, but rather includes several areas, but they are integrated or at least related to the environment such as health, whenever there are serious potential reasons Damages that are characterized by the nature of seriousness and irreversibility, and for which no conclusive scientific evidence is available, so whenever there is justification for doubt, it is necessary to move towards precaution (Laurence, p. 21.).

The principle of precaution is also characterized by continuous development, which makes it accompanying scientific developments, as its existence is temporary, as soon as absolute certainty replaces uncertainty, and from it resort to the principle of prevention or not, according to whether the existence of harm is confirmed or not.

1-2-2 The emergence of the principle of precaution

- Embodying the principle of precaution at the international level

Although the first appearance of the principle of precaution was in Germany(madin. 2012-2013 p. 168), as part of a draft law aimed at ensuring clean air in 1970, which was adopted in 1974 That is, the beginning was from the internal level, but since then the principle of precaution has received the attention of internationalIncluding the Vienna Convention on the Protection of the Ozone Layer in Vienna on March 22, 1985, which entered into force on September 22, 1988, to which Algeria acceded by virtue of Presidential Decree No. Vienna for the Protection of the Ozone Layer, done in Vienna on March 22, 1985, (published in J.R.G.C. of Rabi' al-Awwal 29, 1413 corresponding to September 27, 1992, Twenty-Ninth Year, No. 69, pp. 1801-1802), Decree Supplement Presidential No. 92-354 of Rabi` al-Awwal 25, 1413 corresponding to September 23, 1992, which includes accession to the Vienna Convention for the Protection of the Ozone Layer concluded in Vienna on March 22, 1985, (published in J.R.C. dated 23 DhulHijjah). 1420 corresponding to March 29, 2000, the thirty-seventh year, No. 17, pp. 6-17). The fifth preambular paragraph reads as follows: "Bearing in mind also the precautionary measures to protect the ozone layer that have already been taken at the national and international levels". As stated in Article 2/1, "Parties shall take appropriate measures in accordance with the provisions of this Convention and the provisions of the applicable protocols to which they are parties, in order to protect human health and the environment from harmful effects that result from or are likely to result from human activities that occur or are likely to modify the Ozone Layer".

Also among the international agreements that adopted the precautionary destination, the Montreal Protocol on Substances that Deplete the Ozone Layer in Montreal on September 16, 1987, entered into force on January 1, 1989, acceded to by Algeria under Presidential Decree No. 92-355 of Rabi` al-Awwal 25, 1413 corresponding to September 23 The year 1992, including accession to the Montreal Protocol on Substances that Deplete the Ozone Layer, concluded in Montreal on September 16, 1987, and its amendments (London, June 27 and June 29, 1990), (published in J.R.G.C. dated Rabi` al-Awwal 29, 1413 corresponding to For September 27, 1992, Twenty-Ninth Year, No. 69, p. 1802), Supplement to Presidential Decree No. 92-355 of Rabi' Al-Awwal 25,

1413 corresponding to September 23, 1992, including accession to the Montreal Protocol on Substances that Deplete the Ozone Layer, which was concluded in Montreal on September 16, 1987 and to its amendments (London 27 and June 29, 1990), (published in J.R.C. dated Dhu al-Hijjah 23, 1420 corresponding to March 29, 2000, 37th year, No. 17, p. 18 - 17). The preamble states: "Bearing in mind its obligation under the Vienna Convention to take appropriate measures to protect human health from harm caused or likely to result from human activities that modify or are likely to modify the ozone layer.") conferences, as it was recognized internationally Following the Rio Conference on Environment and Development, which led to the adoption of two international agreements: the United Nations Framework Convention on Climate Change and the United Nations Convention on Biological Diversity. As well as three non-binding texts, which are respectively: the Rio Declaration, the Declaration of Principles on Forests, and the Agenda for the Twenty-first Century (Farida. 2005. p. 19).

The United Nations Framework Convention on Climate Change stated (Madin. 2012-2013 p. 168) in C3/3: "...and where there are threats of significant or irreversible harm, lack of certainty should not be invoked.

Conclusive scientific reason for postponing the adoption of these measures, bearing in mind that policies and measures related to addressing climate change should be carried out in a cost-effective manner, ensuring the achievement of global benefits at the lowest possible cost.

Then came the Convention on Biological Diversity (The Convention on Biological Diversity in Rio de Janeiro on June 5, 1992, entered into force on December 29, 1993, ratified by Algeria under Presidential Decree No. 95-163 of Muharram 7, 1416 corresponding to June 6, 1995, including the ratification of the Convention on Biological Diversity, Signed in Rio de Janeiro on June 5, 1992, (published in J.R.C. of Muharram 15, 1416 corresponding to June 14, 1995, 32nd year, No. 32, p. 3-21), where the preamble states: "Where there is a threat of severe reduction or loss of biological diversity, full scientific uncertainty should not be used as a reason to postpone measures to avoid or minimize this threat." In turn, it emphasizes precautionary measures to avoid excessive disturbance of biological diversity, and it also recognizes the principle of precaution.

Finally, the Rio Declaration of June 13, 1992 (Nicolas 1999, p. 141.) came to stipulate in its fifteenth principle: "In order to protect the environment, countries take extensive precautionary measures according to their capabilities. There is no scientific reason for delaying the adoption of cost-effective measures to prevent environmental degradation.

The principle of precaution has been accepted and supported by states, which is reflected in its enshrining in many international conventions, in particular the Cartagena Protocol on Biosafety, which emphasized the application of the principle of precaution regarding genetically modified organisms more than once. It follows: "Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development." As stated in P1 of it, the following: "in accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development..." in which it is recognized that one of the objectives of the Protocol is the application of the precautionary principle. He also referred to the principle of precaution in some detail in Article 6/10 and Article 11/8, which stipulate the following: "The lack of scientific certainty as a result of insufficient information and relevant scientific knowledge regarding the severity of the potential harmful effects resulting from a living modified organism, to the conservation and sustainable use of the biological diversity of the Party of import, taking into account also the risks to human health, shall not prevent that Party from taking a decision, as appropriate, regarding the import of the living modified organism..... with a view to avoiding or minimizing potential adverse effects.

The consecration of the principle of precaution did not remain exclusively at the international level, as countries quickly included it within their internal legislation (

101 du 2 février 1995 relative au renforcement de la -/1 du loi n°95200ART

l'absence de certitudes compte tenu des connaissances "protection de l'environnement : scientifiques et techniques du moment ne devait pas retarder l'adoption de mesures effectives et proportionnées visant à prévenir un risque de dommage grave et irréversible à l'environnement J. O. R. F du 03 février 1995, n°29, p 1840).), which is ("à un coût économiquement acceptable. what the Algerian legislator did.

- Embodying the principle of precaution at the internal level (in Algerian legislation

The Algerian legislator has adopted the precautionary approach through (Decree No. 88-149, which regulates the regulation applied to the canceled classified facilities), which required that the license application for the establishment of classified facilities be attached to a document of risks and measures taken to avoid them, which are precautionary measures.

Executive Decree 90-78 related to studies of the extent of the canceled impact (Executive Decree 90-78) also included the idea of precaution when it was stipulated that the impact study should contain the measures that the project owner intends to take to eliminate or mitigate the consequences of the project harmful to the environment.

Executive Decree No. 97-254 related to prior licenses for the production or import of toxic or special hazardous substances obligated the application for a license to attach a statement of the precautions to be taken in accordance with the presentation of the product, especially the prohibited uses thereof.

A precautionary view was adopted in the decision to prevent the import, production, distribution, marketing and use of genetically modified plant material, as it stated in Part 1 of it the following: "It is prohibited to import, produce, distribute, market and use genetically modified plant material.

In all of these texts, the precautionary approach was present, but the principle was not explicitly stated until the statement came in Law No. 03-10 related to the protection of the environment in the framework of sustainable development, where it stipulated (Law No° 03-10) in Article 3/6: The lack of technology, given the current scientific and technical knowledge, causes delays in taking actual and proportionate measures.

To prevent the risk of serious damage to the environment, at an acceptable economic cost.

It also stipulated the principle in Law No. 04-20 related to the prevention of major dangers and the management of disasters within the framework of sustainable development (Law No° 04-20), where it came in Article 8/2 as follows: "The principle of caution and prudence: according to which, uncertainty should not be due to the lack of scientific knowledge." Currently, technology is causing delays in adopting effective and proportionate measures aimed at preventing any danger to property, people and the environment in general, at an economically acceptable cost.

The principle of precaution did not remain confined to the environmental field, but rather moved to neighboring fields related to human health(Law No° 03-10), so that Law No. 09-03 relating to consumer protection and the suppression of fraud, in turn, enshrined the principle of precaution, so the principle was referred to in Chapter One of Chapter Four under the name of fraud suppression.

So that the public authority was given the right to intervene to take precautionary measures just because of the possibility of a risk, even if it was not real. Article 54 refers to the following: “A temporary refusal to enter an imported product at the borders is authorized in case of suspicion of non-conformity with the product in question.

2-The impact of the precautionary principle on the obligation to ensure safety

2-1 Conditions for applying the precautionary principle

2-1-1 Lack of scientific certainty

Despite the scientific development and prosperity, he cannot count all the effects that may be produced by activities or products on the individual. That is why we find that some products are suspected of causing harm, and therefore this should not be taken as an excuse to refer without preventing its occurrence, and taking the required measures(Ben Maarouf.2011-2012 p. 113.).

2-1-2the presence of a suspicious risk that may occur

The danger is characterized in this hypothesis by two characteristics

A)- It is a danger that is not scientifically certain, that is, the absence of scientific data. The meaning of this does not result in the possibility of danger. But it needs more research and analysis.

b)- It is a potential danger, i.e. the presence of fears and threats that the danger resulting from the product or service cannot be remedied, due to its lack of consumer safety or its impact on health (eimara. p. 05).

2-1-3The potential damage must be significant

So that the degree of risk is significant, so the damage is irreversible and irreversible(Ben Maarouf.2011-2012 p. 119.).

If these conditions are met, the following measures are taken:

By extrapolating the text of Article 6/03 of the Environmental Protection Law and according to what is in force in practice and legal logic, we find that these measures are as follows.

Either the product may be suspended for a temporary period in order to verify the absence of danger and the removal of pre-existing doubt.

Or the product is banned and suspended permanently.

In both cases, it is necessary to take into account the circumstances in order to know the appropriate measure to be taken and to justify it.

Hence, the producer is obligated to fulfill some obligations imposed by this principle, such as the obligation to warn of all dangers, the obligation to ensure safety, the obligation to inform...etc.

Accordingly, if the conditions of the precautionary principle are met, and the required measures are not taken, it is considered a violation of this principle, and the producer has made a mistake by neglecting it, and on this basis his responsibility is based.

2-2Applying the principle of precaution to ensure consumer safety

Article 02 of Law 89-02 related to consumer protection, dated 1989, stipulates that: (Every product, whether it is a material thing or a service of whatever nature, must have guarantees against all risks that may affect the health of the consumer). Rather, the legislator included in the Consumer Protection Law a special chapter under the title "Conservative Measures and the Principle of Precaution(Law No° 03-09 Articles 53_1 to 67).

2-2-1The field of industrial products

It is known that they are those movables that are the object of industrial or craft production and cannot be counted because there are industrial products characterized by their danger to the safety of those who carry them, in addition to high-tech industrial products (electronic), and therefore due to their nature, it must be in case of doubt that they will cause damage. from taking the necessary measures to prevent it in accordance with the principle of precaution. Therefore, because of the difficulty of identifying the hidden defect in these products and the danger they contain, a new concept was given to go along with it and achieve consumer protection, and thus the defect became the one that does not achieve security and safety. This idea was brought by the French judiciary according to its legal texts in the Civil Code (Articles 1386_1 to 1386_18.

2-2-2 In the area of commitment to the media

The legislator has obligated the producers to inform the consumer of the dangers that result from his holdings. The legislator did not limit them to the confirmed danger only, but there may be suspicion only, especially some of the current products that may be counterfeit, as the consumer does not care about that, but his concern is to get the latest products in the market Therefore, the legislator obliged the producer to carry out this duty. The application of the principle of precaution is evident that the scientific uncertainty of the occurrence of harm with the presence of a potential risk should not be a reason for not informing the consumer of what he should and trying to market his product only without taking into account the interest of the consumer.

2-2-3 The field of medical products

This is a fertile place for the application of this principle, and perhaps the reason for this is the nature of this field, as it stipulates, for example, in Article 35 of Executive Decree 92-284 of July 5, 1992, related to the registration of pharmaceutical products that: product marketing

In addition to all this, we find that the principle of precaution imposed another obligation that did not exist before, which is the obligation to follow up. Whereas, the producer cannot invoke the exemption from liability by claiming development risks(eimara. p. 34).

Conclusion

To summarize the foregoing in this research, a number of the following conclusions can be drawn:

The obligation to ensure safety is a commitment that came to confront the legal vacuum to protect the consumer from the developments of scientific development, so that it has become at the present time more than an inevitable necessity due to the temptation of consumers and their neglect of the risks of products, and therefore it is necessary to establish preventive solutions to control the damages of recent developments that affect consumers.

Linking responsibility primarily to the obligation to ensure consumer safety, which leads to tightening the responsibility so that the consumer is protected from all damages caused to him without discrimination.

A legal system based on prevention and precaution must be adopted

The necessity of a parallel between science, development and law to achieve effective and efficient consumer protection.

Finding new legal devices and mechanisms to impose and monitor legal frameworks and mechanisms to protect the consumer.

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16-Law No. 09-03 of Safar 29, 1430 corresponding to February 25, 2009, relating to consumer protection and the suppression of fraud, (published in J.R.C.

17-101 du 2 février 1995 relative au renforcement de la protection de -/1 du loi n°95200ART

l'absence de certitudes compte tenus des connaissances scientifiques et "l'environnement : techniques du moment ne devait pas retarder l'adoptassions de mesures effectives et proportionnées visant à prévenir un risque de dommage grave et irréversible à l'environnement à J. O. R. F du 03 février 1995, n°29, p 1840)("un cout économiquement acceptable.

18-Cass 1^{er}Civ 22 janv 1991 " le fabricant et le vendeur de certains produits d'usage courant spécialement destines aux soins ou au confort du corps humain sont tenus d'une obligation de sécurité".

19-Law No 83-660 du 21/07/1983 sur la sécurité du consommateur dit " la loi la lumière" , devenant code de la consommation loi N° 94-442 du 03/01/1994.

20-Art L 221-1 C cons fr " les produites et les services doivent dans les conditions normales d'utilisations ou dans d'autre conditions raisonnablement prévisibles par le professionnel présenter

la sécurité à laquelle on peut légitimement s'attendre et ne pas porter atteinte à la sante des personnes"

21- Art 1386-4 al 1 c civ fr "Un produit est défectueux au sens de présent titre lorsqu' il n'offre pas la sécurité à laquelle on peut légitimement s'attendre "